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April 13, 2007

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
c/o Natek, Inc.
236 Massachusetts Avenue, N.E., Suite 110
Washington, DC 20002

Re: Value-Added Communications, Inc.
Petition for Review; CC Docket No. 96-45

Dear Secretary Dortch:

Enclosed please find an original and four (4) copies of the Petition for Review of Value-Added Communications, Inc. for filing in the above-referenced proceeding.

Please date-stamp the additional enclosed copy. If you have any questions regarding this filing, please feel free to contact the undersigned.

Sincerely,

Wendy M. C

Kathleen Greenan Ramsey
Wendy M. Creeden

cc: Greg Guice (FCC)
Kermit Heaton (VAC)
John Nakahata (Equivoice)
Stephanie Weiner (Equivoice)
Bradford Berry (TON Services)
Bill Stathakaros (American Telecommunications Systems)
Jonathan Canis (Eureka Broadband Corporation)
Darius Withers (Eureka Broadband Corporation)

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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
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	)	
Value-Added Communications, Inc.	)	
	)	

PETITION FOR REVIEW

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Dated: April 13, 2007

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SUMMARY

The Commission's review of the recent Bureau *Order* is necessary to avoid an injustice to VAC and to avoid adoption of a policy that would promote discriminatory and inequitable application of remittance obligations in the industry. The Bureau's *Order* is arbitrary and capricious and denies Petitioner its due process rights. Moreover, the basis of the *Order* is flawed in its specific factual findings with regard to VAC and in its failure to address the legal arguments and a resolution presented by VAC.

The Commission should not allow double collection of USF payments. Not only is double collection unjust, it violates the Act and the Commission's long-standing policy against double collection of USF contributions. Indeed, double collection is routinely avoided by the government and the courts and should be avoided by the Commission here as well. Instead, the Commission should require USAC to implement *simple* administrative procedures, as described below, in order to verify contributions and issue a credit for USF payments submitted through another carrier. VAC requests that the Commission adopt these procedures and remand its Audit Report to USAC for the processing of its USF payments in accordance with these procedures.

Before the
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Value-Added Communications, Inc.	)	
	)	

To: The Commission

PETITION FOR REVIEW

Pursuant to section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, Value-Added Communications, Inc. ("VAC" or "Petitioner"), through its undersigned counsel, respectfully submits this Petition for Review of the *Order* issued by the Wireline Competition Bureau ("Bureau") pursuant to delegated authority in the above-captioned proceeding.[1] Specifically, VAC seeks Federal Communications Commission ("Commission") review of the Bureau *Order* that refuses to allow a credit for duplicative payments to the federal Universal Service Fund ("USF" or "Fund"). In support of its Petition for Review, VAC submits the following information, including the specific questions for review with reference to the findings of fact and conclusions of law.

I. INTRODUCTORY MATTER[2]

A. Questions Presented:

1. Whether a failure by the Bureau to consider all relevant factors is arbitrary and capricious.

2. Whether a failure by the Bureau to address substantive legal arguments is arbitrary and capricious.

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[1] Federal-State Joint Board on Universal Service, Value-Added Communications, Inc., CC Docket No. 96-45, DA 07-1306, *Order* (rel. Mar. 14, 2007) ("*Order*").

[2] 47 C.F.R. § 1.115(b)(2).

3. Whether a failure by the Bureau to address a proposed resolution in favor of the public interest or the hardship imposed by the *Order* is arbitrary and capricious.

4. Whether a failure by the Bureau to provide notice of consolidation to a petitioner is a denial of due process.

5. Whether a policy of duplicate payments to the USF without any credit or refund mechanism violates the Communications Act of 1934, as amended.

6. Whether a policy of duplicate payments to the USF without any credit or refund mechanism violates federal law.

7. Whether a policy of duplicate payments to the USF without any credit or refund mechanism violates long standing Commission policy against inequitable and discriminatory burden of USF support.

8. Whether the Commission should adopt simple administrative procedures as recourse for avoiding duplicative USF collection.

B. Factors Warranting Commission Consideration of the Questions Presented:

1. The Order entails prejudicial procedural error.

2. The Order embodies an erroneous finding as to an important and material question of fact.

3. The Order conflicts with statute, regulation, case precedent, or established Commission policy.

II. BACKGROUND

Since 1999, VAC has provided an inmate telephone system to the Federal Bureau of Prisons ("FBOP") for use at numerous federal prison sites. As a part of this system, VAC provides interstate and intrastate collect and prepaid calling services for use by the inmates at prison sites. For several years, based on assurance by the FBOP, VAC reasonably believed that the revenues from the FBOP's inmate telephone system were exempt from USF contributions as government revenue. As such, the underlying carrier for the FBOP's inmate telephone system, Sprint Corporation ("Sprint"), treated VAC as an end-user and assessed USF pass through

charges on VAC. VAC paid in full to Sprint these USF pass through charges as they were invoiced to VAC. Although it was not a mandatory contributor, after conducting an internal investigation regarding USF, VAC decided to voluntarily contribute, *on a permissive basis*,[3] to the USF based on the interstate collect and prepaid calling services that VAC provides as part of the FBOP's inmate telephone system. In March 2003, VAC filed revised Forms 499-A for calendar years 2000 and 2001 revenues for this purpose.

Because of the passage of time, VAC was, and continues to be, unable to obtain a refund directly from its underlying carrier for the USF payments that VAC submitted to that carrier during the time that VAC was treated as an end-user for USF recovery purposes. Indeed, there is no incentive for VAC's underlying carrier to issue a refund. Even if VAC's underlying carrier were to submit revised Form 499-A filings that move VAC's revenue out of Block 4 (the USF contribution base) and into Block 3 ("other contributor" revenue not included in the contribution base), Universal Service Administrative Company ("USAC") would not process these revised filings or issue the underlying carrier a refund because USAC will not accept downward revisions to 499-A filings beyond one year after the initial deadline[4]

In April 2003, USAC's Internal Audit Division initiated an audit of VAC's Form 499-A filings for calendar years 2000 and 2001 revenues. Over the course of the next two years, VAC responded to numerous inquiries by USAC and USAC's outside auditor, Deloitte & Touche LLP ("D&T"). VAC provided both USAC and D&T with extensive information regarding VAC's

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3 *See* discussion herein at Section IV.

4 At one time this was merely a USAC policy, but this policy was ultimately adopted by the Wireline Competition Bureau. Federal-State Joint Board on Universal Service, et al., CC Docket Nos. 9645, 98-171 and 97-21, *Order*, FCC 04-3669, ¶¶10-14 (WCB Dec. 9, 2004) ("*WCB Revisions Order*").

2000 and 2001 revenues and how those revenues were reported on its Form 499-A filings. Throughout the audit, VAC consistently maintained that it was entitled to an offset for USF contributions that VAC made indirectly, *as a government-only exempt end-user*, through its underlying carrier.

In October 2004, USAC's Internal Audit Division ("Division") finalized its Report regarding the audit of VAC's Form 499-A filings for calendar years 2000 and 2001 revenues. In that Report, the Division calculated the amount of USF contribution owed by VAC based on the corrected years 2000 and 2001 revenue information provided in the audit process.[5] The Division, however, refused to allow for a credit of the USF payments that VAC has already submitted to its underlying carrier and indicated that VAC instead should obtain a refund from the carrier to whom payment was made.[6] USAC stated that the basis for the refusal of a credit for VAC's USF payments to its underlying carrier is as follows:

> For many reasons, it is difficult, if not impossible, for USAC to verify the precise extent of alleged double-payment situation and to determine whether an underlying carrier, in fact, reported and paid on a particular carrier's revenues without data carefully correlated by both carriers.[7]

In other words, USAC decided that it would not issue a credit to VAC for the USF payments that the VAC has already made to its underlying carrier because USAC believed, *incorrectly*, that it is impossible for USAC to administratively verify that those payments were remitted to the USF by its underlying carrier.

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5 *See* Page 3 of Exhibit 1 (USAC Audit Report) to VAC's Request for Review on file with the Commission and part of this record.

6 *Id.* at 6.

7 *Id.*

The Division's Audit Report regarding VAC's Form 499-A filings for calendar years 2000 and 2001 revenues was approved by the USAC Audit Committee and Board of Directors at their quarterly meeting on April 18, 2005. On April 18, 2005, the USAC Audit Committee and Board of Directors approved the Value-Added Communications, Inc. Audit Report issued by USAC's Internal Audit Division, USAC Audit Report No. CR2004FL008 ("USAC Audit Report," "Audit Report" or "Report").[8] Throughout USAC's audit process, VAC maintained that it is entitled to a credit for USF payments made to its underlying carrier during the years covered by the audit. In its Audit Report, USAC claimed that it is precluded from issuing a credit to VAC because USAC believes it is unable to verify that VAC's underlying carrier actually remitted the USF payments received from VAC.[9]

Request for Review. On June 17, 2005, pursuant to sections 54.719(c) and 54.721 of the Commission's Rules,[10] VAC filed a Request for Review of USAC's refusal to issue a credit to VAC for USF payments made to its underlying carrier.[11]

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8 *See* Exhibit 1 (USAC Audit Report) to VAC's Request for Review on file with the Commission and part of this record.

9 *See id.* at 6.

10 47 C.F.R. §§ 54.719(c) & 54.721.

11 *Request for Review of Decision of the Universal Service Administrator by Value-Added Communications, Inc.*; USAC Audit Report No. CR2004FL008; CC Docket No. 96-45 (filed June 17, 2005) ("Request for Review"). During the process of preparing responses to USAC's audit, it came to the attention of VAC that various inadvertent mistakes were made in the reporting of its calendar years 2000 and 2001 revenues on its Form 499-A filings. Accordingly, VAC submitted corrected Form 499-A filings in October 2003 and January 2005. It is VAC's understanding that none of its revised Form 499-A filings (March 2003, October 2003 and January 2005) have been processed by USAC because, as part of these filings, VAC sought a credit for the USF payments that the Company had already paid to its underlying carrier. Furthermore, on January 31, 2006 and March 2, 2006, USAC sent notices to VAC requesting that VAC file revised Forms 499-A consistent with the Audit Report or USAC would prepare the revised Forms on behalf of VAC and issue invoices based on those revised USAC-prepared Forms. Because of the pending Request for Review of the Audit Report, VAC could not have an officer sign the revised Forms for filing as USAC requested, and VAC provided notification to USAC of this situation by letter

Bureau Order. The Bureau responded to VAC's Request for Review by issuing the *Order* that is the subject of this Petition for Review. Without any notice, in its *Order*, the Bureau unilaterally consolidated VAC's Request for Review with a number of other carrier petitions and, instead of considering or addressing the specific facts or arguments presented by VAC, the Bureau summarily denied VAC's Request for Review along with the other carrier petitions. As detailed in the following sections, the Bureau's *Order* is arbitrary and capricious and denies Petitioner its due process rights. Moreover, the basis of the *Order* is flawed in its specific factual findings with regard to VAC and in its failure to address the legal arguments and resolution presented by VAC. Instead, given that double collection is unjust and violates the Act and the Commission's long-standing policy against double collection of USF contribution, the Commission should require USAC to implement *simple* administrative procedures, as described below, in order to verify contributions and issue a credit for USF payments submitted through another carrier. In this Petition for Review, VAC requests that the Commission adopt these procedures and remand its Audit Report to USAC for the processing of its USF payments in accordance with these procedures.

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dated March 20, 2006. Despite the pending Petition for Review, USAC, however, proceeded to prepare the revised Forms 499-A on VAC's behalf and issued invoices to VAC for the audit amounts in April, May, June and July of 2006. VAC filed appeals of these invoices with USAC on June 9, 2007, July 14, 1006 and September 5, 2006, and, accordingly, VAC has not paid the amounts disputed as part of its Request for Review. These invoice appeals are still pending with USAC, and USAC is continuing to assess late payment interest on the disputed audit invoiced amounts.

III. PREJUDICIAL PROCEDURAL ERROR

A. The *Order* Is Arbitrary and Capricious

The Bureau's failure to consider all relevant factors presented by VAC in its Request for Review is arbitrary and capricious.[12] The Bureau's conclusion that permitting duplicate payments without any recourse is appropriate is based on a single finding that VAC is a mandatory contributor, a finding that results from a failure to review all relevant facts provided in VAC's Request for Review. Indeed, the Bureau failed to consider the material fact that VAC is not a mandatory contributor, but instead is a permissive contributor that has voluntarily chosen to contribute to the Fund.[13]

In addition, the Bureau acted in an arbitrary and capricious manner when it failed to address the significant arguments raised by VAC that demonstrate that requiring duplicative payments violate Congressional directives, the Act and federal law.[14] The Commission must demonstrate a rational basis for its decisions, which the Bureau has failed to do here.[15] The Bureau is also silent with regard to the simple administrative resolution proposed by VAC that clearly serves the public interest by ensuring fair and nondiscriminatory payments amongst all

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12 *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441 (D.C. Cir. 1995) (Commission acted arbitrarily and capriciously in denying license upon finding that there would be interference with astronomical observatory without also considering the public interest in adding additional television service and, thus, did not consider all of the relevant factors).

13 *Request for Review* at 3 and n.5; *see also*, discussion herein at Section IV.

14 *Request for Review* at 6 - 13.

15 *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164 (D.C. Cir. 1994) (court reversed the Commission for failing to demonstrate a rational basis for its decision, noting that the Commission gave only a "vexingly terse" explanation for its rationale and "silently glosses over" the differences between land-based and water-based cellular service in issuing an order mandating a uniform rule for both); *see also Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992) (the Commission irrationally ignored the most serious objections to its proposed revisions of the rules.).

contributors to the Fund.[16] Finally, it was arbitrary and capricious to blatantly ignore the predicament of carriers that cannot obtain refunds of the USF payments from the underlying carrier due to the expiration of dispute provisions in contracts and, significantly, the Commission's own rules that do not permit underlying carriers to file corrective Form 499 filings.[17]

B. Violation of VAC's Due Process

Given that VAC's financial property is at issue in this case, VAC is entitled to due process.[18] VAC was never provided notice of the consolidation of its Request for Review with other carrier petitions and, therefore, VAC was denied due process. Furthermore, the Bureau's consolidation of several petitions resulted in erroneous generalizations. VAC's Request for Review stated clearly that VAC was a permissive filer for 2001.[19] By consolidating the cases, the Bureau incorrectly assumed that all petitioners were the same, and the Bureau ignored the specific facts and arguments applicable to VAC alone. Due process required that VAC receive notice of the consolidation and an opportunity to object to such consolidation. No such notice was provided, and, therefore, due process was denied to VAC.

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16 *Flagstaff Broadcasting Foundation v. FCC*, 979 F.2d 1566 (D.C. Cir. 1992) (Commission must respond to any serious alternative proposal that purports to serve the public interest better than current Commission practices).

17 *Innovative Women's Media v. FCC*, 16 F.3d 1287 (D.C. Cir. 1994) (arbitrary and capricious decision where the record showed that the delay was caused by the applicant's well-documented difficulty in finding new counsel, not by the intentional actions of the applicant, as found by the Commission).

18 *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987); *Accord Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968).

19 *Request for Review* at 3 and n.5.

IV. THE ORDER CONTAINS AN ERRONEOUS FINDING AS TO AN IMPORTANT MATERIAL FACT AND SHOULD BE OVERTURNED

The *Order* is based on the Bureau's finding that VAC was a mandatory contributor with an obligation to contribute *directly* to the federal USF and, therefore, VAC could not shift the obligation to VAC's underlying carrier, Sprint.[20] The Bureau's finding, however, is incorrect. VAC did not have an obligation to contribute directly. To the contrary, as explained in VAC's Request for Review, VAC's service satisfies the USF government-only exemption and, therefore, VAC is not required to contribute directly to USF.[21] VAC has voluntarily decided to contribute on a permissive basis, but is not a mandatory contributor.

Specifically, in its *1997 Universal Service Order*, the Commission created certain exemptions from contribution requirements, including an exemption for government entities that purchase telecommunications services in bulk on behalf of themselves, public safety entities, non-common carriers and other providers of interstate telecommunications providing telecommunications exclusively to public safety or government entities.[22] The government exemption is included in the instructions for Form 499-A. The language almost explicitly repeats the Commission's language from the *1997 Universal Service Order*:

> Certain entities are explicitly exempted from contributing directly to the universal service support mechanisms and need not file this Worksheet. Government entities that purchase telecommunications in bulk on behalf of themselves (e.g., state networks for schools and libraries) are not required to file or contribute directly to universal service . . . Similarly, if an entity provides interstate telecommunications exclusively to public safety or government entities and does

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20 *Order* at ¶¶ 11-12.

21 *Request for Review* at 3 and n.5.

22 *See* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd. 8776, ¶800 (1997) (subsequent history omitted) ("*1997 Universal Service Order*").

not offer services to others, that entity is not required to file or contribute directly to universal service.[23]

While VAC has decided to contribute to a USF based on the interstate collect and prepaid calling services that VAC provides as part of the FBOP's inmate telephone, VAC nevertheless qualifies for the government-only exemption for USF contributions because VAC provided interstate telecommunications services to only one customer, the FBOP, a government entity, in 2001.[24] VAC has filed, and continues to file, the appropriate forms for USF contributions on those revenues; but, from 2001 to the present, VAC has provided service exclusively to the FBOP and various other government prisons and, accordingly, satisfies the government-only exemption. As such, VAC is a permissive filer rather than a mandatory contributor, a material fact in which the Bureau was incorrect and erroneously based its findings in the *Order*.

V. THE *ORDER* VIOLATES THE COMMUNICATIONS ACT AND FEDERAL LAW AND THUS SHOULD BE OVERTURNED

USAC's and the Bureau's attempt to recover USF contributions from VAC without providing any means of credit or refund for payments made by VAC to its underlying carrier undeniably results in the double collection of USF. This result is simply not allowable. Congress and the Act do not permit it and it is not consistent with the basic principle of law that the government is not entitled to double payment. Accordingly, the Commission should reverse the Bureau's *Order* and require USAC to process VAC's credit request using the simple administrative procedures described in Section VI, below.

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23 FCC Form 499-A, Instructions at 8.

24 *See 1997 Universal Service Order at* ¶800; *see also* Form 499-A, Instructions at 8.

A. Double Collection of USF Payments Violates the Act

Congress mandates that USF contributions must be collected in an equitable and non-discriminatory manner. Specifically, section 254(d) of the Act provides that,

> [e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on *an equitable and nondiscriminatory basis*, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.[25]

Courts have interpreted this provision to require that USF contributions be administered in a fair way that does not result in certain carriers being harmed more than others. For example, citing to Congress' equitable and non-discriminatory mandate, the Fifth Circuit rules that carriers with large international revenues could not be required to contribute to USF on those revenues when their contributions would amount to more than their interstate revenues.[26] The Fifth Circuit concluded that such a practice was not "equitable or non-discriminatory," but instead improperly imposed prohibitive costs on those international carriers and "harmed them more that it harmed others" in violation of the Act.[27]

In a companion provision of the Act, section 254(f), Congress extended the "equitable and non-discriminatory" mandate for federal USF to state USF contributions.[28] This state companion provision includes the exact same "equitable and non-discriminatory" mandate as

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25 47 U.S.C. § 254(d) (emphasis added).

26 *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 434-35 (5th Cir. 1999).

27 *Id.*

28 47 U.S.C. § 254(f).

specified in section 254(d) for federal USF contributions.[29] Based on this ":equitable and non-discriminatory" mandate, the Fifth Circuit ruled that states could not collect state USF contributions on interstate revenues because the Commission already collects federal USF based on those revenues.[30] Importantly, the Court concluded Congress' "equitable and non-discriminatory" mandate did not allow such a double collection of USF from the government, and, thus, the state could only collect state USF based on intrastate revenues.[31] The Court ruled that the double collection of USF from multi-jurisdictional carriers impermissibly discriminated against them by placing them at a competitive disadvantage to carriers that provided interstate services only.[32]

B. Double Collection of USF Payments Violates a Well-Established Principle of Federal Law

The goal of avoiding double collection is not unique or limited merely to the USF or the Commission. Rather, the avoidance of double collection by the government is a well-established principle of federal law that underlies many other federal government assessment programs. For example, the Internal Revenue Service ("IRS"), which administers the federal excise tax, has a similar system to USF in which reseller carriers can provide resale certificates to underlying carriers to avoid the double collection problem.[33] In a situation in which the underlying carrier

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29 Section 254(f) mandates that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State." 47 U.S.C. § 254(f) (emphasis added).

30 *AT&T Corp. v. Pub. Util. Comm'n. of Tex.*, 373 F.3d 641, 646-647 (5th Cir. 2004).

31 *Id.*

32 *Id.* at 647.

33 *See Generally, I.R.S. Publication 510, Excise Taxes for 2004* (describing collection amounts and procedures for federal excise taxes).

has erroneously collected the excise tax from a reseller carrier and remitted the tax with the IRS, the reseller carrier has the option (and the legal standing) to directly seek from the IRS a refund of the tax collected by the underlying carrier.[34] In effect, this procedure allows a method for a reseller to recoup the tax erroneously paid to an underlying carrier and, thus, avoid double collection by the government.

In similar tax areas, the federal courts have repeatedly upheld refunds or offsets to one taxpayer when the tax has already been paid by another party, or when a party over-pays its taxes. For example, the Fifth Circuit ruled that taxpayers who overpaid taxes during the years 1960-1966 were entitled to a mitigation (*i.e.*, an offset or refund), notwithstanding the passage of time or any defense based on the running of the statute of limitations.[35] Similarly, the District Court for the Eastern District of Pennsylvania ordered a refund of amounts tendered by the employer, but not withheld by it from its employees, because the U.S. Government had also collected these taxes from the employees and had received a double payment of the amount due.[36]

In another context, Congress prohibited another federal regulatory agency, the Environmental Protection Agency ("EPA"), from obtaining double payment from the public. Specifically, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), commonly referred to as "Superfund," provides legal authority for the EPA to

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34 *Id.* at 5.

35 *Cocchiara and Roussei v. United States*, 779 F.2d 1180 (5th Cir. 1986).

36 *American Friends Services Committee v. United States*, 368 F. Supp. 1176, *rev'd on other grounds*, 419 U.S. 7 (1974).

seek payment for environmental pollution from land owners, both past and present.[37] As part of CERCLA, Congress clearly established that if an environmental clean-up has been completed and the government's response costs fully reimbursed, the government is entitled to no further recovery from any responsible person.[38] In other words, similar to USF contributions, Congress has decided that the government is not entitled to double payment for environmental clean up costs. Significantly, the courts have repeatedly confirmed this prohibition against double collection by the EPA.[39]

In sum, the courts have found that it is wholly inequitable, discriminatory, and unfair for the government to collect twice for a government assessment such as USF. It clearly is not the case that government is, or should be, entitled to double collection, particularly when the double collection is most likely to occur at the expense of one particular kind or class of contributor. There is no exemption for USF from this well-established principle. In fact, Congress' mandate for an equitable and non-discriminatory collection of USF reinforces this general principle. Instead, as demonstrated in other contexts, it is a well-established principle of law that double collection by the government is not allowed. Accordingly, the Commission is obligated to establish the administrative procedures necessary to avoid double collection of USF payments.

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37 *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9628.

38 42 U.S.C. § 9613(f).

39 *See B.F. Goodrich Co. v. Murtha*, 855 F. Supp. 545, 546 (D. Conn. 1994) ("Settlements reduce non-settlers potential liability 'by the amount of the settlement.' No agency is entitled to more than full reimbursement."); *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 677 (D.N.J. 1989) ("Congress has plainly indicated that non-settling defendants' contribution claims will be barred, and they will be credited only with the amount of settlement and nothing more.").

VI. THE *ORDER* CONFLICTS WITH LONG STANDING COMMISSION POLICY AND THUS SHOULD BE OVERTURNED

The *Order*'s finding that it is permissible to allow double recovery of USF payments without any refund or credit recourse mechanism violates the Commission's policy against inequitable and discriminatory burden of USF support and, thus, should be overturned. The Commission should instead require USAC to process VAC's credit request using the simple administrative procedures described in Section VI below.

Specifically, based on Congress' "equitable and non-discriminatory" mandate specified in section 254(d) of the Act, the Commission has recognized that the mechanism for USF contribution needs to be structured in such a way so as to avoid double payment of USF by contributors.[40] In fact, since the inception of the Fund, the Commission has attempted to avoid double contribution to the USF. In its initial order implementing the USF, the Commission expressed concern regarding possible double payments and adopted the current end-user revenue contribution methodology primarily as an attempt to avoid double USF contribution.[41] In implementing an end-user revenue methodology, the Commission rejected other contribution methodologies in part because they would have required resellers to make double USF payments.[42]

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40 *See 1997 Universal Service Order* at ¶¶842-854; *see also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Order on Reconsideration*, FCC 04-237, ¶¶36-39 (rel. Nov. 29, 2004) ("*Universal Service Recon Order*"); Federal-State Joint Board on Universal Service, et al., *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd. 24, 952, ¶79 (2002) ("*Universal Service Methodology NPRM*").

41 *1997 Universal Service Order* at ¶¶843-854.

42 *Id.* at ¶¶845-847.

The Commission sought to avoid double payments by resellers, and cited to the following as an example of a situation that should not be allowed to occur:

> For example, assuming a 10 percent contribution rate on gross revenues, if facilities-based carrier X sells $200.00 worth of telecommunications services directly to a customer, its contribution will be $20.00. If reseller B buys $180.00 worth of wholesale services from Carrier A and B sells the same retail services in competition with X after adding $20.00 of value, B would owe a contribution of $20.00 on these $200 worth of services, but B would also be required to recover the portion of the $18.00 contribution that A must make and would likely pass on to B. Therefore, while X would face $200.00 in service costs and $20.00 in support costs, B would face $200.00 in service costs and almost certainly substantially more than $20.00 in support costs. Adding another reseller to the A-B chain would compound this problem.[43]

The Commission concluded that collection of USF payments in this manner would clearly place resellers at competitive disadvantage to other carriers and, thus, should not be permitted.[44] As a result, the Commission decided to adopt an end-user revenue methodology in an attempt to avoid double payment of USF by resellers. The Commission, clearly concerned about the implications of double collection in light of the Act's mandate, viewed end-user revenue as a competitively-neutral contribution methodology that would "eliminate . . . the double payment problem" in the context of resellers.[45] Based in part on this goal and Congress' mandate for "equitable and non-discriminatory" collection of USF support, the Commission extended the end-user revenue methodology to other federal regulatory contributions.[46]

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43 *Id.* at ¶845.

44 *Id.* at ¶846.

45 *Id.*

46 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local

Underlying the Commission's intent to have the end-user revenue methodology avoid double contribution by resellers is an important directive -- that USF pass-through fees would be correctly assessed. As the Commission itself has recognized, when an incorrect pass-through assessment is made that results in an underlying provider receiving USF payment from a resale contributor, an impermissible "double burden" has been placed on the reseller.[47]

While of course it would be impossible for the Commission to ensure that all pass-through fees are correctly assessed (mistakes do happen), the end-user revenue methodology will inevitably fail to avoid double contribution because it lacks a means by which carriers can correct these inevitable mistakes. Without a method for proper accounting of USF payments made to underlying providers, the methodology does not meet Congress' mandate that the USF burden be allocated in an "equitable and non-discriminatory" manner. As it stands, without a method of correction, the system is structured in such a way that resellers contribute more than their equitable share and the government receives an impermissible windfall at the resellers' expense.[48] In lacking a method to account for USF payments submitted through underlying carriers, the current system inappropriately discriminates against resellers because it harms

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Number Portability, and Universal Service Support Mechanisms, *Report and Order*, 14 FCC Rcd. 16,602, ¶¶55-70 (1999). Additionally, in its pending USF methodology proceeding, the Commission has specifically noted that any new or revised methodology adopted by the Commission must comply with Congress' mandate for equitable and non-discriminatory USF collections. *See Universal Service Methodology NPRM* at ¶73.

47 *Universal Service Recon Order* at 39.

48 *See, e.g.*, Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Robert A. Calaff, Senior Corporate Counsel, T-Mobile USA, Inc. and James H. Barker and William S. Carnell, Latham & Watkins, Counsel for Leap Wireless International, Inc., DA 03-2835, at 5 (Sept. 5, 2003).

resellers more than it harms non-reseller carriers.[49] The inequitable and discriminatory result is precisely what Congress intended to eliminate when it adopted its "equitable and non-discriminatory" mandate for USF contributions, and is exactly what the Commission was trying to avoid when it adopted the end-user methodology.

Indeed, because there is no mechanism for the program to properly account for USF payments made to underlying carriers, Congress' fears about inequitable and discriminatory USF collections and the Commission's fears about double collection from resellers have come to fruition. In fact, VAC's situation is precisely the example to which the Commission cited as an undesirable result. Until there is a mechanism by which VAC may receive credit for the USF payments that VAC has already made through its underlying provider, double collection has undeniably occurred and the universal service system itself fails to comply with Congress' "equitable and non-discriminatory" mandate and the Commission's policy against double contribution.

VII. THE COMMISSION SHOULD AVOID DUPLICATE PAYMENTS TO USF BY ADOPTING ADMINISTRATIVE PROCEDURES FOR DOUBLE PAYMENT CREDITS

While the Commission adopted the end-user revenue methodology in an effort to avoid double collection, without a process by which the government may properly account for USF

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[49] *See Tex. Office of Pub. Util. Counsel*, 183 F.3d at 434-35. The problem for resellers is further exacerbated in that downward revisions to USF filings are prohibited more than one year beyond the initial filing deadline. *See WCB Revisions Order* at ¶¶10-15. Thus, even if a mistake were discovered and a clear instance of double collection was readily evident - and even if the underlying provider acknowledged the error and would otherwise be willing to cooperate with the reseller to remedy it - nothing would in fact be done if the double collection occurred more than one calendar year in the past, because the underlying provider would itself be unable to obtain a credit from USAC. This further demonstrates the inequitable impact that the current regime has on resellers and why a simple administrative process to address double collection issues would be of such significance.

payments already made through other providers, the Commission's efforts to avoid double payment and violation of the Act and federal law are wholly ineffective. Not only has the Commission tasked resellers with determining whether they themselves should be direct contributors, it also has asked wholesale providers to determine the contribution status of their reseller customers.[50] In implementing these obligations, it is inevitable that mistakes will be made by carriers. By not providing a mechanism through which carriers can correct these mistakes, the Commission fails in its efforts to avoid the double collection problem and violation of the Act and federal law.

Accordingly, in order to avoid the double collection problem and violation of the Act and federal law, the Commission should direct USAC to implement administrative procedures that will allow for the proper accounting of USF payments already made through other providers. Although USAC is under the mistaken belief that it is "impossible" for USAC to implement administrative procedures that could verify whether such payments were remitted by the underlying carrier to the USF,[51] VAC submits that, in fact, there are simple administrative procedures that USAC could implement to verify, and therefore avoid, double recovery of USF payments by the government. These procedures would not be unduly burdensome for USAC, but instead would shift most of the administrative burden to the carriers involved.

Specifically, a contributor who seeks a credit for USF payments that it has submitted to an underlying carrier would be required to submit a written verified request for the credit to USAC. As part of the written request, the requesting contributor would be required to certify

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50 *See* FCC Form 499-A, Instructions at 18-19; *see also Universal Service Recon Order* at ¶39.

51 *See* USAC Audit Report at 5.

that it has appropriately reported on its Forms 499 the telecommunications services it purchases from its underlying carrier as part of its end-user revenue upon which USF has been, or will be assessed. The requesting contributor furthermore would be required to provide USAC with proof of the USF payments to the underlying carrier. Such documentation could include, for example, copies of the invoices and cancelled checks or bank statements showing the payment deductions.

Upon receipt of a credit request with this supporting documentation, USAC would then forward a copy of the request and supporting documentation to the underlying carrier and require the carrier to confirm that the USF payments submitted to the carrier by the requesting contributor were, in fact, remitted to the USF. For those years in which a mark-up of the USF recovery fee was allowed, the underlying carrier would be required to specify how much of the USF payment by the requesting contributor was remitted to the Fund. Since April 1, 2003, when mark-ups of USF recovery fees were banned, an underlying carrier who received USF payments from another carrier would merely verify that it remitted the full amount of the USF payment. Again, the burden would be on the underlying carrier, not USAC, to determine the amount of the payment from the requesting contributor that the underlying carrier remitted to the USF.[52] Finally, USAC would issue the appropriate credit to the requesting contributor based on the underlying provider's response.[53]

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[52] VAC is in the process of obtaining an affidavit from Sprint with this information and intends to file the affidavit as a supplement for the Commission's review and consideration as part of this Petition.

[53] Situations of non-responsiveness from carriers could be forwarded to the Commission for any appropriate enforcement action.

Notably, these procedures would merely be requiring carriers to confirm compliance with the Commission's Rules. A carrier who charges a USF recovery fee but does not report those revenues and/or contribute to USF on those revenues is in violation of the Commission's USF orders and truth-in-billing requirements.[54] Indeed, these procedures could serve as an extremely useful tool for USAC and the Commission in verifying compliance with USF payment obligations. USAC, the Commission and consumers would benefit from any information received as part of this process that indicates a carrier may not be remitting USF recovery payments to the Fund. Based on any such information, USAC and the Commission could then analyze whether any further investigation is warranted. Furthermore, implementation of these procedures would provide additional incentives for carriers, including both resellers and wholesale carriers, to ensure that they are in compliance with their USF obligations.

In sum, contrary to USAC's and the Bureau's belief, there are simple administrative procedures that could be implemented to verify whether a credit is warranted to avoid double payment of USF contributions, and most of the verification burden for these procedures would not fall on USAC or the Commission. As described above, carriers would be required to confirm compliance with their USF obligations, and the government would have a useful vehicle by which it could detect violations of the Commission's Rules.

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[54] *See Federal-State Joint Board on Universal Service*, at al., *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd. 24952, ¶¶45-55 (2002); Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, CC Docket No. 98-17 and CG Docket No. 04-208, *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, FCC 05-55, ¶¶8-10, ¶¶25-29 (rel. Mar. 18, 2005).

VIII. CONTACT INFORMATION

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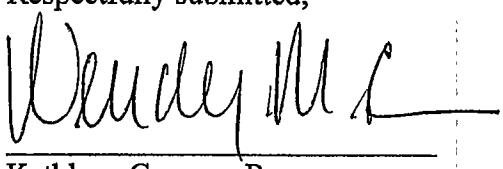
IX. CONCLUSION

Pursuant to Congress' "equitable and non-discriminatory" mandate, the cornerstone of the administration of USF is that double collection should be avoided. The Commission attempted to adhere to this mandate by adopting its current end-user revenue methodology. However, without a mechanism to provide credits in instances of double payments, Congress' mandate and the Commission's goal of avoiding double collection cannot be achieved. Instead, the Commission should adhere to the well-established principle of law against government double collection and adopt the necessary administrative procedures that would require USAC to make a proper accounting of USF payments already received by the government through underlying carriers. Contrary to USAC's and the Bureau's beliefs, such procedures are entirely

possible, and could be fashioned in such a way that most of the verification burden would be placed on the carriers involved.

For the foregoing reasons, the Commission should overturn the Bureau's *Order* by confirming that double recovery is not allowed under the USF program and direct USAC to process VAC's request for credit for the USF payments already submitted to its underlying carrier under the simple administrative procedures described herein.

Respectfully submitted,



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Counsel to Value-Added Communications, Inc.

Dated: April 13, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2007, true and accurate copies of the foregoing Petition for Review of Value-Added Communications, Inc. were sent via overnight delivery to the following:

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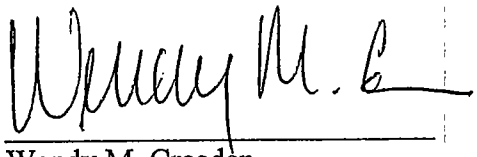

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